No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMERICAN FEDERATION OF TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Rhonda Weingarten
David J. Strom
Mark Richard
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave. NW
Washington, DC 20001
(202) 393-7472

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Ste. 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

Mosaic - (301) 927-3800 - Cheverly, MD

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TABLE OF AUTHORITIES

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) ..... *passim*

Bd. of Educ. v. Round Valley Teachers Ass'n,
914 P.2d 193 (Cal. 1996) 14

Bd. of Regents of the Univ. of Wis. Sys. v. Southworth,
529 U.S. 217 (2000) 35

Citizens United v. FEC,
558 U.S. 310 (2010) 37

Connick v. Myers,
461 U.S. 138 (1983) 7, 33

Ellis v. Bhd. of Ry., Airline & S.S. Clerks,
466 U.S. 435 (1984) 34

Garcetti v. Ceballos,
547 U.S. 410 (2006) 8, 14

Harris v. Quinn,
134 S. Ct. 2618 (2014) ..... *passim*

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) 35, 37

King v. Burwell,
135 S. Ct. 2480 (2015) 28, 29

Knox v. SEIU,
567 U.S. 298 (2012) 8, 30

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 34

Locke v. Karass,
555 U.S. 207 (2009) 38

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984) 11, 12, 13

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 36

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

Statutes

20 U.S.C. § 6311(d)(4) 16

Cal. Educ. Code § 44929.21 14

Cal. Educ. Code § 44932 *et seq.* 14

Cal. Gov't Code § 3543.2 14

Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) 16

Other Authorities

AFT, *A 'Big Bet' on Educator-Led Collaborations and Solutions: The AFT Innovation Fund (2009-16)* (2017), https://www.aft.org/sites/default/files/if_big-bet_2017.pdf 18, 19, 22, 23

AFT, *ER&D: Twenty-Five Years of Union-Sponsored, Research-Based Professional Development*, Am. Educator, Winter 2006-2007, http://www.aft.org/periodical/american-educator/winter-2006-2007/erd-twenty-five-years-union-sponsored 17

AFT, *Member Uses Union CPR Training to Save a Life*, PSRP Reporter, Spring 2015, http://www.aft.org/sites/default/files/periodicals/rep_spring2015.pdf 24

Alliance for Excellent Educ., *On the Path to Equity: Improving the Effectiveness of Beginning Teachers* (2014), http://all4ed.org/wp-content/uploads/2014/07/PathToEquity.pdf 20

Baltimore City Schools Collective Bargaining Agreement for 2013-2016, http://www.baltimoreteachers.org/wp-content/uploads/2015/01/Balt-City-BTU-2013-2016-Teacher-Agreement-03-10-14-kjz1.pdf 25

Boston Schools Collective Bargaining Agreement for 2010-2016, http://btu.org/wp-content/uploads/Final_BTU_Contract_No_Index.pdf 21, 24, 25

Chicago Schools Collective Bargaining Agreement for 2012-2015, http://www.ctunet.com/for-members/text/CTU_Contract_As_Printed_2012_2015.pdf 25

Steven Elbow, *Indiana and Michigan, a Tale of Two New Right to Work States*, Cap Times (Feb. 27, 2015), http://host.madison.com/ct/news/local/writers/steven_elbow/indiana-and-michigan-a-tale-of-two-new-right-to/article_dae6b5d3-e85b-5f14-ad5b-0602624e0c66.html 37

Jennifer Goldstein, *Taking the Lead: With Peer Assistance and Review, the Teaching Profession Can Be in Teachers' Hands*, Am. Educator, Fall 2008 ..... 19, 20

Harvard Graduate Sch. of Educ., Project on the Next Generation of Teachers, *A User's Guide to Peer Assistance and Review*, http://connectingthedots.aft.org/sites/aft/files/documents/UsersGuideToPAR.pdf 20

Health & Safety for All, AFT, http://www.aft.org/health-safety-all (last visited Jan. 17, 2018) 25

Sean Higgins, *Wisconsin Public Sector Unions Still Losing Members*, Wash. Examiner (Aug. 12, 2014), http://www.washingtonexaminer.com/wisconsin-public-sector-unions-still-losing-members/article/2551945 29

Julia E. Koppich, *Using Well-Qualified Teachers Well: The Right Teachers in the Right Places with the Right Support Bring Success to Troubled New York City Schools*, Am. Educator, Winter 2002 22

David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 Indus. & Lab. Rel. Rev. 749 (2012) 17

Los Angeles Schools Collective Bargaining Agreement for 2008-2011, http://www.utla.net/sites/default/files/Final_UTLA_2008-2011_contract.pdf 21, 24, 25

John E. McCarthy & Saul A. Rubinstein, *National Study on Union-Management Partnerships and Educator Collaboration in US Public Schools* (Oct. 2017), https://www.cecweb.org/wp-content/uploads/2017/11/Cornell_Rutgers_Working_Paper.pdf 26, 27

Minneapolis Schools Collective Bargaining Agreement for 2013-2015, https://www.nctq.org/dmsView/Minneapolis_Final_CBA_2013-2015 ..... 24, 25, 26

Brian Minnich, *Our Battle with SEIU Gets a Thumbs Up in Wall Street Journal*, Freedom Found. (Nov. 4, 2015), http://www.myfreedomfoundation.com/blogs/liberty-live/our-battle-with-seiu-gets-a-thumbs-up-in-wall-street-journal 28

Montgomery County, Maryland, Schools Collective Bargaining Agreement for 2015-2017, http://www.montgomeryschoolsmd.org/uploadedFiles/departments/associationrelations/refresh2014/MCEA%20Contract%20FY15-FY17%20.pdf 18, 24

New York City Schools Collective Bargaining Agreement for 2007-2009, http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009.pdf 23, 24

Saul A. Rubinstein & John E. McCarthy, *Public School Reform Through Union-Management Collaboration*, *in* 20 Advances in Industrial & Labor Relations 1 (David Lewin & Paul J. Gollan eds. 2012) 22

San Francisco United School District Collective Bargaining Agreement for 2014-2017, http://www.sfusd.edu/en/assets/sfusd-staff/contract%20and%20salary%20schedules/Certificated%20Collective%20Bargaining%20Agreement%207-1-14%20thru%206-30-17150106_20020.pdf 26

David Shepardson, *Michigan Union Membership Falls Sharply in '14*, Detroit News (Jan. 23, 2015), http://www.detroitnews.com/story/business/2015/01/23/michigan-union-membership/22214357/ 29

Valerie Strauss, *Why Collaboration Is Vital to Creating Effective Schools*, Wash. Post (May 2, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/05/02/why-collaboration-is-vital-to-creating-effective-schools/?utm_term=.2fb1d4686c35 26

U.S. Dep't of Educ., *Advancing Student Achievement Through Labor-Management Collaboration* (2011), http://www.ed.gov/sites/default/files/labor-management-collaboration-program.pdf 20

U.S. Dep't of Educ., *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* (2012), http://www2.ed.gov/documents/labor-management-collaboration/white-paper-labor-management-collaboration.pdf 19, 20

United Fed'n of Teachers, *Environmental Safety*, N.Y. Teacher (June 2, 2016), http://www.uft.org/know-your-rights/environmental-safety 24

INTEREST OF *AMICUS CURIAE*[1]

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.7 million members in more than 3,500 local affiliates nationwide. Many AFT affiliates represent members in States where, either by statute or through collective bargaining agreements, represented employees are required to pay fair share fees to cover the costs of collective bargaining and contract administration. The AFT has had a long-term commitment to striking the appropriate balance under the First Amendment between members' and fee payers' rights. Indeed, it was an AFT affiliate that was involved in the original decision at issue in this case, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

SUMMARY OF ARGUMENT

I. States have a compelling interest in the effective management of their workforces – the success of every government program and function depends on it. Managing a workforce requires developing and administering employment contracts, which necessarily and uncontroversially entails limits on employee speech. For example, managers may be required to advance proposals – including on issues of public concern – with which they personally disagree. Support staff may be required to lend their time and talents to that effort, despite personal reservations. That is permitted by the First Amendment because in imposing those restrictions the Government acts as employer, not sovereign, regulating the workers as employees within the confines of their employment, not as citizens in the public square.

The Government as employer may also elect to solicit employees' views on contract matters, believing that such input improves the contract and the administration of its programs. It might, for example, hire a consultant to survey workers and use that information to make recommendations to management. Or it might pay a handful of workers overtime to participate on a workers' advisory panel.

Given agencies' finite budgets, some of these costs (as well as the cost of management's time) may then be passed on to employees, in the form of reduced raises or benefits, particularly when pay for administrators and consultants comes from the same portion of the budget available to pay workers. This is so even though the workers effectively paying the bill may disagree with the positions taken by the administrators, consultants, or their fellow employees

during the development or administration of the contract. To our knowledge, no one has ever suggested that there is any First Amendment problem with that arrangement.

Many States have reasonably chosen to solicit workers' views on contract matters by working with a union, rather than a consultant or a more ad-hoc workers' advisory committee. The question in this case is whether the First Amendment treats the costs associated with the union's participation in collective bargaining differently than these expenses or the management-side costs that may be passed on to workers.

It does not. Fair share fees burden First Amendment rights no more, and no differently, than the reductions in pay workers regularly endure to defray the cost of the speech of other participants in the contracting process. That the cost is spread through a fair share fee line-item deduction in each paycheck – rather than by the State paying the union directly from funds that would otherwise go to finance worker pay and benefits – cannot be determinative. Surely the First Amendment does not penalize government transparency.

At the same time, fair share fees burden speech and association rights only within the workplace, leaving employees entirely free to express their views on any bargaining, professional, political, or other issue in multiples ways that enjoy complete protection under labor law and the First Amendment.

II. The role of collective bargaining in administering government agencies, and the State's

compelling interest in preserving the present system, is well illustrated in the context of public education.

A. Collective bargaining is a principle means through which local administrators flesh out and operationalize new education initiatives mandated by federal or state law, or developed by local school districts. In participating in that process, unions bring their members' informed insights to the project and promote educator buy-in. Fair share fees also help support union-provided training to implement new initiatives, such as mentoring, professional development, and evaluation programs. Unions, using fair share fees, also play a central role in ensuring proper implementation of such reforms on an ongoing basis, both in bargaining and through the grievance or other contractual processes.

Fair share fees further support union participation on school health and safety committees that identify school hazards (from leaking roofs to asbestos), design and implement programs to improve students' health (such as training school employees in CPR or how to respond to asthma attacks), and help plan for emergencies (such as natural disasters or incidents of school violence).

Recent studies demonstrate that such union-management collaboration through the collective bargaining process is extremely effective, improving outcomes in some of the most challenged school districts in the nation.

B. Eliminating States' ability to require all employees to share in the union-side costs of bargaining would seriously disrupt the management of essential state institutions, including public schools.

For example, with reduced funds, unions would have fewer resources for implementing school improvement measures, sitting on health and safety committees, or engaging in other collaborative projects.

It is no answer to suggest that unions should make up the difference by trying harder to recruit dues-paying members. That shift in priorities is itself harmful to States' interests in promoting collaborative working relationships with their unions. The presence of free-riders in a school sows discord and interferes with the close working relationships necessary to provide high quality education. Moreover, in AFT's experience in right-to-work States, recruiting new members sometimes requires a much greater focus on pursuing individualized grievances and taking a more confrontational approach with administrators.

III. Although unnecessary to obtain relief for their client, petitioner's lawyers have asked this Court to declare that the First Amendment prohibits the imposition of even a single penny of fair share fees by any public employer in any context anywhere in the country, regardless of the extent of the First Amendment or government interests implicated by any given activity supported by the fees. Particularly in the absence of any record, that astonishingly broad facial challenge should be rejected on its face.

This Court has repeatedly analyzed constitutional challenges to the assessment of fees on a category-by-category basis, weighing the competing constitutional and governmental interests implicated by particular types of expenditures. Having forgone this restrained approach, petitioner's all-or-nothing claim can be accepted only if he can show that employees' First Amendment interests in *every* use to which fair share

fees are put will *always* outweigh *any* conceivable countervailing state interest. This he cannot do, particularly in the absence of any record establishing the full range of uses to which fair share fees are put.

At the very least, the Court should restrict any constitutional ruling to the context before it, leaving for another day how the constitutional balance must be struck in other States or other sectors, like education, where the State's interest in promoting effective collaboration with its unions may be more pronounced.

ARGUMENT

I. Requiring All Employees To Share In The Cost Of Developing And Implementing Their Contracts Does Not Trigger Strict Scrutiny.

A central premise of petitioner's argument is that "bargaining with the government is political speech indistinguishable from lobbying the government." Br. 10-11. This analogy permits him to lay claim to the heightened First Amendment scrutiny applied when "the government forc[es] individuals to support a mandatory lobbyist or political advocacy group." *Id.* 12.

The analogy, however, is inapt. Modern collective bargaining is an indispensable part of many public agencies' internal decisionmaking process, informing how States structure and run their agencies. Participants in that process – whether they be members of management, consultants, employees voicing their views through internal surveys or focus groups, or more formalized employee groups like advisory committees or unions – engage in speech as employees, not as citizens. Of course, participants remain free to speak to the issues as citizens as well,

but during the workplace deliberation process, their First Amendment rights are necessarily curtailed in order to permit effective management. Assessing all employees a portion of the cost of that process – including the cost of a union's involvement in it – does not trigger the full spectrum of First Amendment restrictions applied to lobbying.

A. The Strict Scrutiny Petitioner Invokes Only Applies When The Government Burdens A Worker's Right To Lobby As A Citizen Outside His Job.

As petitioner himself insists, public sector collective bargaining plays a role in state agencies' decisionmaking regarding a wide range of issues – from employee pay and benefits to how the agency is operated day-to-day. Petr. Br. 11, 14. Some of those matters, he argues, touch upon matters of great public concern (although, as we discuss *infra*, a great many do not). AFT agrees that when employees speak as citizens upon such matters outside of work, that speech is entitled to fulsome First Amendment protection. That is why, for example, this Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that workers cannot be assessed funds for traditional lobbying outside of collective bargaining without their consent. *See id.* at 232-36.

A central question in this case is whether requiring financial support for collective bargaining is subject to the same exacting scrutiny. That bargaining touches upon issues of public concern does not answer that question – the Court has long held that *context* in which the employee speaks also matters. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138,

147-48 (1983). When she is speaking in the employment context, addressing the Government as an employer rather than as a sovereign, an employee's interest in speaking freely even on matters of grave public concern must be balanced against the State's interest in effectively managing its workforce and institutions. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 418-20 (2006). After all, management of government institutions unavoidably is conducted *through* speech and often requires dictating *what* speech employees can (or must) engage in. *Id.* at 418-19, 422-23.

This means that the Government necessarily has substantial leeway to control the speech of employees sitting around a conference table as they develop government policies or negotiate contracts that will substantially affect the agencies' effectiveness, even though the decisions may affect questions of deep public concern. Allowing employees unfettered ability to speak their minds during internal agency deliberations (and a right to sue when they feel that right has been infringed) would undermine effective Government to an extent the drafters of the First Amendment could never have envisioned.[2]

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[2] This Court's decisions in *Knox v. SEIU*, 567 U.S. 298 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), are not to the contrary. *Knox* addressed the process for collecting fees to fund a political campaign in opposition to certain ballot initiatives, not fair share fees to finance the development and enforcement of an employment contract. *See* 567 U.S. at 303-05, 315. And the Court determined that the home health care workers in *Harris* were not "full-fledged public employees," 134 S. Ct. at 2634, but were employed by a "person receiving home care," *id.* at 2624. As a

B. Fair Share Fees Finance Workplace Speech, Not Lobbying, And Therefore Do Not Trigger Strict Scrutiny.

Collective bargaining serves the same proprietary function in the private and public spheres. It is a method by which an employer regulates its workforce and makes decisions about many of the details of its basic operations. How that bargaining is conducted and paid for is determined by the Government acting as employer, not sovereign, and any burden on speech interests fall upon workers in their capacities as employees without restricting their abilities to speak their minds as citizens outside of their employment.

1. The Contracting Process Routinely Requires Limitations On Employees' Speech Within The Workplace Without Giving Rise To Substantial Constitutional Concern.

State employees are regularly required to refrain from, engage in, or support speech on issues of public concern with which they disagree in the course of participating in an agencies' development and enforcement of contracts and policies.

For example, a manager may be required to convey to workers a bargaining position with which she strongly disagrees (*e.g.*, on student testing). And her assistants may be required to lend support to that position in various ways (*e.g.*, by drafting a speech,

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consequence, collective bargaining did not play its usual role as a part of the management of the State's own workforce and the operation of its own agencies. *See id.* at 2634-36.

scheduling a meeting, or fielding calls from others in the organization on the topic).

At the same time, *all* employees may be required to bear a portion of the expense of developing and conveying management's positions on issues of mundane or public significance, even if they disagree with those positions. As a practical matter, the funds for paying administrators will often come from the same pot of money available to pay for other employees' wages and benefits. When that happens, the cost of management-side speech in collective bargaining is effectively paid by workers, whether they like it or not. As far as we know, no one has ever suggested that a First Amendment objection to that reality.

That is because all of the burdens involved – the restrictions on speech, the compelled speech, the forced subsidization – are imposed by the Government in its capacity as employer in the course of governing its workplace, not in its role as sovereign regulating its citizens.

2. *Soliciting Employee Input During Contracting, And Passing The Cost Of That Participation On To Employees As A Whole, Does Not Trigger Strict First Amendment Scrutiny.*

Given all this, it is difficult to see how the First Amendment would preclude an agency from soliciting employee input during contracting, and passing along a portion of that cost to the affected workers as well.

a. Suppose, for example, that an agency decides to implement a new family leave policy. It needs to resolve various details about the program and wants

input from the affected employees. It could hire an outside consultant to survey employees, hold focus groups, etc., then report on the workers' views and make its own recommendations.

That process should not give rise to any serious First Amendment concern. Individual employees have no right to object that they were left out of the process or that the resulting contract offered to them was developed in consultation with someone with whom they might disagree. *See, e.g.*, *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").

Nor would there be any serious First Amendment objection if the agency effectively required all employees to bear the cost of the consultant's services by paying the consultant out of the money otherwise available for the new benefit program or pay raises. As discussed employees pay for internal workplace speech in *that* sense all the time without giving rise to constitutional objections.

b. If the First Amendment permits a state employer to develop its employment contracts in collaboration with an outside consultant, and to deduct the cost of that work from the employees' pay, it must also permit the State to assess worker concerns more directly.

Suppose that instead of a consultant, an agency established a workers' advisory committee to discuss the new benefit plan with administrators. Although the committee members' statements might influence the contract the agency ultimately offers the workers,

that does not amount to any form of compelled speech or association implicating First Amendment rights. *See Knight*, 465 U.S. at 286-87, 288-90. The committee may be tasked with conveying the views of the workforce generally, but it does not represent individual workers in the sense binding them to the resulting contract any more than a consultant would.

Nor would the constitutional analysis change if the agency paid the committee members overtime for the additional work and deducted that cost from the funds available for financing the new benefit or the next year's raises. That would effectively force each worker to pay her pro rata share of the expenses. But as discussed, workers do not have a First Amendment right to exempt themselves from the economic consequences of their employers' internal contracting processes.

3. Collective Bargaining Is Another Means Of Soliciting Employee Input Into Employment Contracts.

Likewise, collective bargaining is means through which government agencies receive input from their workers, giving rise to no greater First Amendment concern than when that input is provided through a consultant or a more ad hoc worker advisory committee.

Again, the fact that the union's speech may affect the contract offered to workers, or that the nonmembers may be excluded from direct participation in the negotiations, gives rise to no First Amendment objection – the Government has complete freedom to decide with whom it will consult in the operation of its programs, including when drafting

employment contracts. *See Knight*, 465 U.S. at 283-87.

Nor is any special First Amendment problem raised by the fact that the union is sometimes called the "representative" of all the employees and is prohibited by law from favoring its own members. The union represents nonmembers only in the same sense as the consultant or advisory – it's speech has an effect on the contract ultimately offered the workforce. But having such an affect does not violate the associational freedom of those who are affected. *See* 465 U.S. at 288-90. The duty of fair representation – which restricts what the union can say in its discussions with management – may burden the *union's* First Amendment rights. But it does not transform what is otherwise permissible (*i.e.*, the Government's decision to listen exclusively to the union, with incidental effects on the contract offered to petitioner) into something constitutionally suspect.

Requiring all workers to pay their pro rata share of the cost for the union's participation in the contracting process does not trigger strict scrutiny either. As mentioned, workers already routinely pay cost for management's work in collective bargaining when management salaries reduce the pool of money available for other employees' pay. There is no reason for a dramatically different treatment of the expenses incurred by other participants in the contracting process, whether it be an outside consultant, particular employees sitting on an advisory council, or a more formalized union.

Indeed, it seems clear that petitioner could raise no constitutional objection if, instead of deducting fair share fees from nonmembers' paychecks, his employer

simply reduced all workers' salaries and used the savings to reimburse the union for the collective bargaining activities that directly benefit the agency. It is difficult to see why the accounting differences between that method and the current fair share fee system should be important. Surely, the First Amendment does not penalize transparency.

* * *

In the end, fair share fees help finance what a union says to management across an office negotiating table. They burden his speech and association rights in his capacity as an employee, in the context of a workplace discussion.

At the same time, the burden is modest, leaving every worker "the prospect of constitutional protection for their contributions to the civic discourse" outside the workplace. *Garcetti*, 547 U.S. at 422. Petitioner remains free to say whatever he likes about the union's positions. *See, e.g., Abood*, 431 U.S. at 230. He is entitled to lobby his legislature on any topic of bargaining, asking it to overturn any provision of any contract or to prohibit bargaining on certain issues (as States have done).[3] But he does not have a constitutional right to shift any portion of the cost of negotiating his contract to his fellow workers or the taxpayers.

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[3] For example, California prohibits collective bargaining over teacher tenure or termination procedures, as well as regarding pension benefits. *See* Cal. Educ. Code §§ 44929.21, 44932 *et seq.*; Cal. Gov't Code § 3543.2; *Bd. of Educ. v. Round Valley Teachers Ass'n*, 914 P.2d 193, 203-04 (Cal. 1996).

II. The History Of Labor-Management Cooperation In Public Education Illustrates How Collective Bargaining Is An Essential Part Of State Agencies' Internal Process For Contracting With Teachers And Improving Education.

Collective bargaining's integral role in the management of government agencies, and State's compelling interest in retaining the benefits of that system, are especially evident in the public education context.

A. States Have A Compelling Interest In Preserving The Educational Benefits Made Possible By The Labor-Management Collaboration Collective Bargaining Facilitates.

Schools and unions have increasingly used the collective bargaining process to cooperate in implementing initiatives aimed at improving education, student health and safety, and other important matters. States have a compelling interest in continuing the process, which has proven effective in improving educational outcomes, particularly in struggling schools.

1. Collective Bargaining Is Essential To The Effective Implementation Of Innovative Programs To Improve Education.

Public schools are foundational to our democracy and the promise of opportunity to all who live in it. Providing that foundation, however, requires constant attention to changing needs and conditions, and therefore demands constant innovation in how our

schools are run. Unions play a critical role in the successful implementation of these initiatives by working with school districts to operationalize collaborative programs through the collective bargaining process, providing training under collective bargaining agreements, and by helping ensure the change are actually implemented through informal communications and, when necessary, formal grievances.

a. Every significant program to improve education requires working out innumerable operational details at the local level, adapting broader principles to the specific circumstances of individual schools. Much of that implementation work is carried out through the collective bargaining process because most initiatives implicate significant terms and conditions of employment, such as the length of the school day, training, teacher evaluations, job security, class size, etc.[4] By working with the union to operationalize and tailor a new program, the school district is able to benefit from the experience of those workers who are in the best position to anticipate how changes can be implemented on the ground and how changes may affect other aspects of the school program. At the same time, by memorializing the changes as part of the collective bargaining

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[4] *See, e.g.*, 20 U.S.C. § 6311(d)(4) (savings clause of Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015), providing that "[n]othing in this subsection shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded to school or local educational agency employees under . . . the terms of collective bargaining agreements").

agreement, the schools and the unions institutionalize the new practices.[5] And because the union has been deeply involved in the process, it is able to promote educator buy-in, which is essential to any initiative's success and sustainability.

Unions also play a critical role in implementing the changes memorialized in the management-labor contract. For example, fair share fees help fund extensive collectively bargained training programs (*e.g.*, train-the-trainer programs on a wide range of professional development topics, including training for peer review and mentoring programs, innovative programs for teaching reading and math, managing student behavior, and general instructional strategies).[6]

At the same time, through their constant contact with the teachers directly involved in implementing these programs, unions can share information with administrators about how the changes are being executed on the ground, their impact on students' learning outcomes, what problems are being encountered, and advice on how to fix them. Often, that communication occurs through formal committees upon which both administrators and

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[5] *See* David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 Indus. & Lab. Rel. Rev. 749, 766 (2012).

[6] *See, e.g.*, AFT, *ER&D: Twenty-Five Years of Union-Sponsored, Research-Based Professional Development*, Am. Educator, Winter 2006-2007, http://www.aft.org/periodical/american-educator/winter-2006-2007/erd-twenty-five-years-union-sponsored.

teachers selected by the union serve, sometimes with direct participation by union officials themselves.[7] Other times, the feedback is provided by the union through the grievance system or other contractual process.

b. This collaborative process has been applied to a broad range of innovative programs to improve education. We describe a few examples below.

Curriculum Initiatives. Unions have worked with management across the country to ensure the fair and successful rollout of new curricula over the years.

For example, with the assistance of the AFT national union, local union leaders in Cleveland, Ohio worked with school administrators to develop a strategy for revising curricula to the new Common Core standards and creating a central Common Core Training Center for teachers.[8] Through this process, more than 250 lesson plans aligned with the Common Core standards were developed and distributed online through AFT's Share My Lesson platform, where they have been viewed more than 300,000 times.[9]

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[7] *See, e.g.*, Montgomery County, Maryland, Schools Collective Bargaining Agreement for 2015-2017, at 14-20, http://www.montgomeryschoolsmd.org/uploadedFiles/departments/associationrelations/refresh2014/MCEA%20Contract%20FY15-FY17%20.pdf [hereinafter Montgomery County CBA].

[8] *See* AFT, *A 'Big Bet' on Educator-Led Collaborations and Solutions: The AFT Innovation Fund (2009-16)* at 13 (2017), https://www.aft.org/sites/default/files/if_big-bet_2017.pdf [hereinafter *Big Bet*].

[9] *Id.* at 13-14.

In Peoria, Illinois, the local union worked with the school district, the City, and local employers to create a program to align technical education with the local job market while also connecting students with local businesses for internships and permanent job placements. Through a further collaboration with the local community college, the program allows many high school students to graduate with college credits directed toward specific career pathways.[10]

Peer Assistance And Review. In another common example, unions have used fair share fees to collaborate in implementing Peer Assistance and Review (PAR) programs in which expert teachers mentor, support, and partner with school administrators to evaluate both new and struggling teachers (union members and non-members alike).[11] The programs are designed to support, improve, and retain good teachers – which thereby helps recruit new teachers – while also facilitating removal of ineffective instructors when these support systems have not succeeded. The programs are often part of a broader collaborative evaluation process in which teachers, union representatives, and school officials jointly design and oversee implementation of a system, as

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[10] *Id.* at 18.

[11] *See, e.g.*, U.S. Dep't of Educ., *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 11-13 (2012), http://www2.ed.gov/documents/labor-management-collaboration/white-paper-labor-management-collaboration.pdf; Jennifer Goldstein, *Taking the Lead: With Peer Assistance and Review, the Teaching Profession Can Be in Teachers' Hands*, Am. Educator, Fall 2008, at 4.

well as participate in a standards-based evaluation of individual teachers.[12]

PAR programs have proven highly effective and have been promoted by the U.S. Department of Education as an example of what can be achieved through labor-management collaboration. *See* U.S. Dep't of Educ., *Advancing Student Achievement Through Labor-Management Collaboration* 11-12 (2011).[13] They have reduced teacher turnover, particularly among new teachers,[14] while at the same time facilitating dismissal of ineffective tenured teachers who have been unable to improve through the assistance PAR offers.[15]

Successful implementation of a PAR program requires substantial training and oversight for expert teachers and mentors. The integrity of any new evaluation system likewise demands extensive training and oversight to ensure that all evaluators are engaged in the same process, and using the same

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[12] *See id.*

[13] http://www.ed.gov/sites/default/files/labor-management-collaboration-program.pdf.

[14] *See, e.g.*, Harvard Graduate Sch. of Educ., Project on the Next Generation of Teachers, *A User's Guide to Peer Assistance and Review* 11-13, http://connectingthedots.aft.org/sites/aft/files/documents/UsersGuideToPAR.pdf [hereinafter *A User's Guide*]; Alliance for Excellent Educ., *On the Path to Equity: Improving the Effectiveness of Beginning Teachers* (2014), http://all4ed.org/wp-content/uploads/2014/07/PathToEquity.pdf.

[15] *A User's Guide*, *supra*, at 11.

metrics. Fair share fees help fund unions' participation in these training and oversight efforts.[16]

Improving Struggling Schools. Unions have likewise used fair share fees to fund bargaining and contract enforcement activities as part of collaborative efforts to revitalize struggling schools. In the mid-1990s, for example, a California teacher's union got together with local administrators of the ABC Unified School District outside of Los Angeles to address the special problems facing a number of low performing schools with mostly poor students, a majority of whom were English language learners. In addition to implementing a peer assistance program, the union worked with the school district to create a new recruitment and teacher training system, even to the point of using union funds to hire substitute teachers that would allow faculty to attend improved professional development training. Over time, the district agreed to involve union representatives in a broad range of joint governance projects addressing nearly every aspect of the schools. Throughout, the educators' national union, AFT, provided extensive technical assistance, including through its training, school improvement, and leadership institutes. The result has been a dramatic improvement in academic

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[16] *See, e.g.*, Boston Schools Collective Bargaining Agreement for 2010-2016, at 86-87, http://btu.org/wp-content/uploads/Final_BTU_Contract_No_Index.pdf [hereinafter Boston CBA]; Los Angeles Schools Collective Bargaining Agreement for 2008-2011, at 77-78, http://www.utla.net/sites/default/files/Final_UTLA_2008-2011_contract.pdf [hereinafter LA CBA].

achievement and graduation rates, making the district a nationally recognized success story.[17]

Unions have engaged in similar joint-efforts elsewhere, for example helping to establish New York City's Chancellor's District to improve its most disadvantaged and struggling schools.[18]

Increasing Instructional Time. More recently, an AFT affiliate in Meriden, Connecticut worked with local administrators to implement what research suggests is one of the most effective methods of improving educational outcomes – significantly increasing the amount of instruction students receive each year.[19] Undertaking such a change creates daunting logistical challenges, affecting nearly every aspect of a school's operation. Through collective bargaining and the close collaboration it can foster, teachers and administrators worked together to iron out the difficulties and provide their students the equivalent of an additional 40 days of instruction time per year.[20] The district has since seen significant improvements in attendance, as well as in test scores

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[17] *See generally* Saul A. Rubinstein & John E. McCarthy, *Public School Reform Through Union-Management Collaboration*, *in* 20 Advances in Industrial & Labor Relations 1, 19 (David Lewin & Paul J. Gollan eds. 2012).

[18] *See, e.g.*, Julia E. Koppich, *Using Well-Qualified Teachers Well: The Right Teachers in the Right Places with the Right Support Bring Success to Troubled New York City Schools*, Am. Educator, Winter 2002, at 22.

[19] *See Big Bet*, *supra*, at 14.

[20] *Id.*

in reading and math, particularly among high needs students.[21]

2. *Collective Bargaining Promotes Health And Safety Within Our Schools.*

Fair share fees also fund unions' important contributions to health and safety within our educational institutions.

Because union members have the most direct and immediate knowledge of school hazards and student safety needs, they provide an important resource in identifying health and safety issues. These issues run the gamut from physical conditions that interfere with learning and compromise student safety (*e.g.*, leaking roofs, heating and cooling issues, mold, asbestos, lead paint, indoor air quality, etc.), to student and staff health concerns (*e.g.*, protocols for dealing with children with trauma, asthma, diabetes, and other chronic illnesses, or training to identify and protect students from bullying or to minimize the risks of blood-borne pathogens), to security concerns (*e.g.*, school violence and property theft), to emergency preparedness (*e.g.*, for floods, earthquakes, fires, and tornadoes).

Unions use fair share fees not only to help identify particular problems, but also to develop and implement solutions through collective bargaining and grievance adjustment. Some issues are addressed directly in collective bargaining agreements.[22] Unions

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[21] *Id.* at 14-15.

[22] *See, e.g.*, New York City Schools Collective Bargaining Agreement for 2007-2009, at 54-57, http://www.uft.org/files/

have also been instrumental in bargaining for, staffing, and training school health and safety committees that identify and respond to problems.[23] Union representatives, supported in part by fair share fees, generally are responsible for recruiting other union members to participate on the committees and for providing training and support for panel members. Union representatives also sometimes sit on the committees themselves.

Unions also devote resources to implementing bargained safety improvements. For example, unions provide employee training on safety issues addressed in the collective bargaining agreements (*e.g.*, First Aid, CPR, blood borne pathogen safety, and emergency preparedness).[24] Those efforts are supported by national unions that provide training materials,

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contract_pdfs/teachers-contract-2007-2009.pdf [hereinafter NYC CBA]; Boston CBA, *supra*, at 93; LA CBA, *supra*, at 287-90; Montgomery County CBA, *supra*, at 35-38; Minneapolis Schools Collective Bargaining Agreement for 2013-2015, at 159, https://www.nctq.org/dmsView/Minneapolis_Final_CBA_2013-2015 [hereinafter Minneapolis CBA].

[23] *See, e.g.*, NYC CBA, *supra*, at 55-56; Montgomery County CBA, *supra*, at 36; LA CBA, *supra*, at 289; Minneapolis CBA, *supra*, at 159.

[24] *See, e.g.*, United Fed'n of Teachers, *Environmental Safety*, N.Y. Teacher (June 2, 2016), http://www.uft.org/know-your-rights/environmental-safety; AFT, *Member Uses Union CPR Training to Save a Life*, PSRP Reporter, Spring 2015, at 6, http://www.aft.org/sites/default/files/periodicals/rep_spring2015.pdf.

research, and best practices information from other schools.[25]

Unions also devote fair share fees to enforcing these requirements. For example, unions in some larger school districts have industrial hygienists on staff to monitor safety compliance. Unions also spend considerable resources researching safety concerns from employees (members and nonmembers alike) and bringing informal and formal grievances when appropriate.

3. Collective Bargaining Provides A Framework For Myriad Other Labor-Management Collaborations As Well.

Unions, using fair share fees, have increased collaboration between school officials and teachers to improve education in thousands of public schools across the nation in many other ways as well. For example, public schools increasingly rely on joint labor-management committees to address a wide range of issues affecting both conditions of employment and quality of education, including teacher recruitment and retention, professional development, and overall strategic planning.[26]

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[25] *See, e.g.*, *Health & Safety for All*, AFT, http://www.aft.org/health-safety-all (last visited Jan. 17, 2018) (collecting resources).

[26] *See, e.g.*, Boston CBA, *supra*, at 34-38, 72, 87; LA CBA, *supra*, at 58-59; Baltimore City Schools Collective Bargaining Agreement for 2013-2016, at 57, http://www.baltimoreteachers.org/wp-content/uploads/2015/01/Balt-City-BTU-2013-2016-Teacher-Agreement-03-10-14-kjz1.pdf; Chicago Schools Collective Bargaining Agreement for 2012-2015, at 104, http://www.ctunet.com/for-members/

The infrastructure for partnership created by such collaborative programs also provides a ready framework for quickly and effectively addressing new or unexpected challenges, such as natural disasters, financial crises, sudden changes in student enrollment, or public health emergencies.

4. The Labor-Management Collaboration Made Possible Through Collective Bargaining Improves Educational Outcomes.

These and many other collaborations made possible by collective bargaining have paid dividends, improving educational outcomes, particularly in disadvantaged schools. *See, e.g.*, Valerie Strauss, *Why Collaboration Is Vital to Creating Effective Schools*, Wash. Post (May 2, 2013) (surveying research).[27]

In a 2017 paper, for example, researchers examined more than 400 schools in six States to assess the relationship between union-management collaboration and student achievement. *See* John E. McCarthy & Saul A. Rubinstein, *National Study on Union-Management Partnerships and Educator*

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text/CTU_Contract_As_Printed_2012_2015.pdf; Minneapolis CBA, *supra*, at 23-54; San Francisco United School District Collective Bargaining Agreement for 2014-2017, at 67-69, http://www.sfusd.edu/en/assets/sfusd-staff/contract%20and%20salary%20schedules/Certificated%20Collective%20Bargaining%20Agreement%207-1-14%20thru%206-30-17150106_20020.pdf.

[27] https://www.washingtonpost.com/news/answer-sheet/wp/2013/05/02/why-collaboration-is-vital-to-creating-effective-schools/?utm_term=.2fb1d4686c35.

Collaboration in US Public Schools (Oct. 2017).[28] The authors found that "school-level collaboration predict[s] the percentage of students performing at or above standards in English Language Arts (ELA), after we controlled for poverty (percentage of students on free or reduced-price lunch), teacher experience, and school type (elementary, middle, high school)." *Id.* at 2. That association, they reported, "is statistically significant and suggests that the highest level of collaboration corresponds to roughly 12.5% more students performing at or above standards, compared to the lowest level of collaboration." *Id.*

The study also suggested some of the underlying reasons why such collaboration improves educational outcomes. For one thing, there is "a strong association between educator collaboration and reduced teacher turnover," an effect that is "particularly pronounced in high-poverty schools," where turnover "was 3.5 times the rate of that in low-poverty schools when school-level educator collaboration was low." McCarthy & Rubinstein, *supra*, at 3. The authors also found that in schools with long-standing union-management partnerships, "many school-level union leaders took on unique roles and responsibilities to improve teaching and student learning," while "teachers in schools with stronger collaboration are more likely to know about and implement innovations from other schools." *Id.* at 5.

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[28] https://www.cecweb.org/wp-content/uploads/2017/11/Cornell_Rutgers_Working_Paper.pdf.

B. Eliminating Fare Share Fees Would Seriously Disrupt The Management Of Thousands Of Schools, To The Detriment Of Education Nationwide.

Petitioner does not contest that States have a compelling interest in preserving management practices that improve government services. Nor does he seriously dispute in this Court that States can reasonably decide that collective bargaining creates such improvements. Instead, petitioner principally argues that allowing workers to avoid fair share fees will have no material effect on collective bargaining or school management. *See* Petr. Br. 36-61. But that claim has no basis in the record (which does not exist). Nor is it supported by common sense and experience.

1. It requires no leap of imagination to predict that a declaration from this Court that public sector workers are entitled to a free pass on paying their fair share of union expenses will result in a substantial decrease in revenue. Petitioner's supporters certainly hope so – they have already organized "aggressive campaign[s]" to persuade workers to opt out of fair share fees or leave their unions through "emails, direct mail, phone calls, social media and cable TV advertising, and even [going] door to door" with "paid canvassers and volunteers."[29] In *King v. Burwell*,

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[29] Brian Minnich, *Our Battle with SEIU Gets a Thumbs Up in Wall Street Journal*, Freedom Found. (Nov. 4, 2015), http://www.myfreedomfoundation.com/blogs/liberty-live/our-battle-with-seiu-gets-a-thumbs-up-in-wall-street-journal; *see also* Friedrichs et al. Amicus Br. 11 ("After *Harris*, the [Freedom] Foundation launched an ongoing outreach program to inform

135 S. Ct. 2480 (2015), this Court accepted the premise that removing an obligation to purchase health insurance could dramatically reduce the number of insured. *Id.* at 2493. The same assumption is even more sensible here – in *King*, those who refused to pay for insurance would lose their insurance; here, employees who refuse to pay for the benefits of union representation would still get to keep them.

The common-sense conclusion that making fair share fees voluntary will lead to a substantial reduction in union revenues is also borne out by the experience in States that have recently enacted right-to-work legislation.[30]

There also should be no question that unions' ability to provide important benefits to States and students would be substantially diminished by loss of fair share fees. Because unions must continue to provide basic contract negotiation and grievance services, reduced revenue will predictably require cuts to other programs and services, like teacher training,

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Harris-affected workers on the West Coast about their newly-acknowledged rights. This outreach includes mailings, emails, television, radio, social media communications, and door-to-door canvassing.").

[30] *See* Sean Higgins, *Wisconsin Public Sector Unions Still Losing Members*, Wash. Examiner (Aug. 12, 2014), http://www.washingtonexaminer.com/wisconsin-public-sector-unions-still-losing-members/article/2551945; David Shepardson, *Michigan Union Membership Falls Sharply in '14*, Detroit News (Jan. 23, 2015), http://www.detroitnews.com/story/business/2015/01/23/michigan-union-membership/22214357/.

peer assistance and review, and school safety programs.

Reducing fair share fees also risks imposing greater costs on taxpayers. As noted, unions use fair share fees to fund a variety of activities that States have a compelling interest in having performed, *e.g.*, evaluating teacher performance, monitoring and addressing school safety issues, training staff on emergency preparedness, etc. Were unions to reduce their participation in these activities, States may have to shoulder more of the cost of these programs themselves.

2. Eliminating fair share fees also predictably strains workplace relations and undermines effective management of schools.

In *Knox v. SEIU*, 567 U.S. 298 (2012), the Court noted that the Government generally has no weighty interest in preventing the general public from free riding on the benefits obtained from general advocacy. *Id.* at 310-12. But States *do* have a compelling interest in maintaining an effective workplace, particularly in their schools. And few things are more corrosive to a close-knit workplace than the perception that some employees are being forced to pay for another's free lunch. Accordingly, it is no answer to say that unions should just try harder to raise more money from their members to replace the lost fair share fees. Charging members more because of the need to support free riders would only make matters worse.

The need to focus on generating additional revenue, as opposed to improving teaching and learning, can impair the collaborative relationship with school administrators in other ways as well. A

strong emphasis on union recruitment can itself be distracting and sometimes divisive. For example, some unions in right-to-work States have found that to attract members, they must focus more heavily on individualized grievances that are more visible to employees and generate more dues-paying members. It can also be more difficult for a union in this circumstance to decline to pursue marginal grievances. The resulting change in grievance practices detracts from other more collaborative activities and diverts resources from grievances that are more likely to improve overall education and safety. The outcome is often a more confrontational, less cooperative relationship between the union and the school districts.

III. Petitioner's Facial, All-Or-Nothing Challenge To All Aspects Of Every Fair Share Fee Ever Charged Anywhere, On The Basis Of No Record At All, Is Itself Facially Defective.

Petitioner and his amici strenuously disagree about the benefits unions and fair share fees confer on nonmembers and on education more generally. But they can point to nothing in the record to support their claims because there is no record in this case. Instead, petitioner has brought an all-or-nothing facial challenge that contravenes not just *Abood*, but multiple long-standing principles of constitutional adjudication that serve to protect the quality of judicial decisionmaking and enforce essential principles of judicial restraint.

A. Petitioner's Bare-Record Facial Challenge Ignores The Substantial Variation In The Uses Of Fair Share Fees And The Resulting First Amendment And Government Interests At Stake.

Petitioner comes to this Court on a bare record with an argument that, of necessity, requires the Court to decide the constitutionality of every fair share fee to be charged by every government employer in the country. That challenge disregards the substantial variation in the uses of fair share fees and the diverse First Amendment implications of those uses.

1. Under any standard of constitutional review, the Court must consider the nature of the First Amendment infringement and the Government's countervailing interests. *See, e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2641-43 (2014). When the challenge is to the extraction of money, the analysis turns critically on what the money is spent on. Here, as discussed, unions spend money on many different things. Many of those expenses involve matters of little conceivable public interest or First Amendment value.

For example, petitioner cannot sensibly claim that weighty First Amendment interests are at stake when a union negotiates over the schedule for in-service days or the paperwork required for obtaining sick leave. Similarly, no lofty constitutional interests are at stake when a union uses fair share fees to allow a union official to sit on a school committee to select a student uniform, allocate teacher parking spaces, or prioritize school maintenance projects.

Nor are significant First Amendment interests implicated when a union represents an individual teacher in most disciplinary and grievance proceedings. The subject of discipline and grievances can run the gamut, but vast numbers concern the mundane stuff of ordinary personnel administration that this Court has repeatedly held outside the purview of the First Amendment. *See, e.g.*, *Connick*, 461 U.S. 138. This includes disputes over whether:

- a teacher's particular absences should be excused;
- a teacher had accrued a certain number of days of sick leave;
- a particular classroom has been too hot or too cold;
- the staff bathroom is being adequately cleaned and maintained;
- the school has been forcing an employee to supervise the lunchroom during her planning or lunch hour;
- administrators have failed to provide adequate accommodations for a disability;
- the physical education teacher has been given adequate equipment or a classroom teacher's books are in need of replacement;
- the union has been given adequate space to hold meetings;
- a particular teacher was being actionably disrespectful to a supervisor, or simply firmly expressing a view;
- the school is taking adequate steps to protect employee property from theft or vandalism;
- a specific teacher qualifies for any of a number of employment benefits (*e.g.*, tuition assistance, training, time off for professional development or to attend a conference, etc.);

- a particular classroom has adequate supplies;
- a given teacher should have been granted a request for a personal leave without pay;
- a particular teacher should be assigned to teach American history instead of global studies.

At the very least, even if petitioner could credibly claim that *every* activity supported by fair share fees implicated matters of public concern protected by the First Amendment, he cannot deny that the *degree* of public interest, First Amendment value, and countervailing government interests varies considerably, depending on the nature of the activity.

Moreover, the mix of interests will necessarily vary from State-to-State and even school-to-school, depending on the particular uses of fair share fees in that jurisdiction. Even looking just at collective bargaining alone, the scope of permissible bargaining varies considerably, often excluding some of the most controversial topics (like tenure and pensions). *See supra* n.5.

2. Because this variation is relevant under any standard of review, the Court has never considered the constitutionality of fair share fees as an all-or-nothing proposition; instead, it has determined constitutional challenges to classes of expenditures. *See Abood*, 431 U.S. at 235-36; *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447-48 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); 500 U.S. at 556-58 (Scalia, J., concurring in the judgment in part

and dissenting in part).[31] And petitioner cannot show why *that* aspect of *Abood* and its progeny is not entitled to *stare decisis* effect.

In fact, the Court has proceeded on the same understanding in other compelled subsidization cases, never doubting that regardless of the Court's First Amendment ruling, States could still impose any portion of a fee used for purposes consistent with the First Amendment. For example, in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court considered a challenge to a student activity fee. It noted that a large portion of the fee funded activities like health services and sports that had little First Amendment implication. *Id.* at 223. Rather than ask whether the fee as a whole was nonetheless unconstitutional because it also funded some political advocacy, the Court segregated the potentially problematic portion of the fee for separate consideration. *Id.*; *see also, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990) (requiring use-by-use analysis of compulsory bar dues). That is the same approach this Court has taken with respect to fair share fees.

That only makes sense. Nothing in the Constitution would prevent a State from allowing

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[31] The Court did not depart from these precedents in *Harris*. There, in addition to applying a level of scrutiny that is inapplicable to the public employment context, the Court was able to take into account all of the relevant uses of agencies fees because the union's representation was "largely limited to petitioning the State for greater pay and benefits." 134 S. Ct. at 2640; *see also id.* at 2637 (union had no grievance responsibilities).

unions to charge a dozen separate fees for specific purposes. And no one could reasonably claim that collecting one fee is unconstitutional simply because collection of another is forbidden.

B. Petitioner's Facial Challenge Defies Ordinary Principles Of Sound Judicial Administration And Restraint.

In asking this Court nonetheless to declare that all fair share fees are always unconstitutional, petitioner brings a facial challenge of the most disfavored kind.

Even in the First Amendment context, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). For one thing, while some facial challenges may arise on appropriately developed records, "[c]laims of facial invalidity often rest on speculation." *Id.* "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (citation omitted). "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

Petitioner's request for constitutional declaration of breathtaking scope on the basis of no record at all flies in the face of each of these basic principles of constitutional adjudication. Although his argument depends on multiple highly contested assertions of fact

regarding complex questions – *e.g.*, predicting the extent to which adopting their free-rider protection will diminish union revenues and membership, how the reduction in resources will affect the exclusive bargaining system, and how a fundamental alteration in States' management of their schools will affect the education of millions of schoolchildren – petitioner established no record below. *Compare, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 332 (2010) (noting facial challenge that "was facilitated by the extensive record, which was over 100,000 pages long") (internal quotation marks omitted), *with Keller*, 496 U.S. at 17 (declining to rule on First Amendment challenge to method for segregating chargeable and non-chargeable portions of bar dues because of lack of a "fully developed record").

Second, abandoning any pretense of respect for judicial restraint, petitioner urges the Court to overrule a longstanding precedent in order to hold that no union may ever charge an unwilling nonmember a penny for *any* kind of activity benefiting her, no matter how weak the First Amendment implications of the charge or how strong the Government's countervailing interests.

Third, petitioner gives the democratic process in the States that provide fair share fees – which have been open and responsive to anti-union complaints and initiatives[32] – no opportunity to fine-tune public

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[32] *See, e.g.*, Steven Elbow, *Indiana and Michigan, a Tale of Two New Right to Work States*, Cap Times (Feb. 27, 2015), http://host.madison.com/ct/news/local/writers/steven_elbow/indiana-and-michigan-a-tale-of-two-new-right-to/article_dae6b5d3-e85b-5f14-ad5b-0602624e0c66.html.

labor relations in a way that could respond to any legitimate, specific concerns he and others like him may have.

Petitioner thus makes an all-or-nothing claim that can succeed only if he shows that every conceivable expenditure funded by such fees is used to support speech of such First Amendment significance that no state interest could overcome it. That, he cannot do. And that should be the end of the case. *See, e.g.*, *Locke v. Karass*, 555 U.S. 207, 221 (2009) (Alito, J., concurring) (because Court had rejected petitioners' "all-or-nothing position, contending that nonmembers of a local may *never* be assessed for *any* portion of the national's extraunit litigation expenses," petitioners appropriately got nothing).

* * *

Whether public sector unions are good or bad for public institutions is a matter of deep, partisan divide in this country. Adherence to the usual rules of constitutional adjudication and judicial restraint is particularly important when the Court confronts a question as politically charged as this one.

To the extent some members of this Court may harbor doubts about whether *Abood* and its progeny have drawn the right line between chargeable and non-chargeable expenses, the Court can consider redrawing that line in an appropriate case in the future.

At the very least, even if this Court determines that the First Amendment bars charging fair share fees in the context presented by this case, it should expressly hold open whether that result applies to other States or other contexts – particularly to the

education context – where the balance of state and individual interests may be different. *Cf. Harris*, 134 S. Ct. 2618 (deciding only constitutionality of charging fare share fees to class of workers represented in the litigation).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Rhonda Weingarten
David J. Strom
Mark Richard
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave. NW
Washington, DC 20001
(202) 393-7472

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Ste. 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

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